

JOHN B. H. WARING.

DECEMBER 6, 1920.—Committed to the Committee of the Whole House and ordered to be printed.

MR. SANFORD, from the Committee on Military Affairs, submitted the following

REPORT.

[To accompany S. 907.]

The Committee on Military Affairs, to whom was referred the bill (S. 907) for the relief of John B. H. Waring, having considered the same, report thereon with a recommendation that it do pass.

The committee has held extensive hearings in this case and has listened to exhaustive argument of counsel and is impressed with the merit of the case. The case also had thorough consideration in the Senate Military Committee. That committee reported favorably and the bill has passed the Senate. The facts can not be more carefully stated than as they appear in the report by Senator Sutherland, which follows:

The bill under consideration provides for restoring Capt. John B. H. Waring to the Army with the rank he would have attained had he not first been unjustly court-martialed and finally wholly retired from the Army; and then for placing him on the retired list.

The case is a most remarkable one. This young man at the age of 24 entered the Medical Corps of the Army, having stood successfully all the rigid physical and mental requirements for admission to that corps. In due course of admission he was examined by two different boards at intervals of about 10 months, and found physically perfect. According to the statements of those who had known him all his life, including four reputable physicians, one of whom had examined him just previously to his entering the Army with a view to determining whether he could pass the physical examination for admission to the Medical Corps, this officer had enjoyed splendid health throughout his life before and after entering the Army up until he sustained the injury which has resulted in expulsion from the Army.

In 1909 Capt. Waring in the course of service was sent to the Philippines and was stationed in the Moro country at one of the hottest posts in the islands, a short distance from the Equator with constant exposure to sunlight and sun glare reflected from water. In June, 1911, nearly three years after his entry into the Army, during which period he passed each of the annual physical examinations, he was stricken, while on maneuvers in the hottest part of the day, with what is known as "light stroke," a form of sunstroke from which solar retinitis developed. This injury, officially diagnosed at the time as such and as having been incurred in line of duty, lies at the beginning of a chain of events that terminated in the dismissal of this officer six years later, upon the

finding of a retiring board that the injury was an obscure nervous or mental trouble, congenital in character and not incurred in line of duty. notwithstanding the overwhelming evidence to the contrary.

Doubtless the serious disease of the eyes largely resulted from improper treatment. Immediately after suffering the stroke, this officer, instead of being confined to a dark room, was required to continue on duty in the light and glare for several days. Shortly after a complete relapse resulted from an unduly prolonged ophthalmoscopic examination by an inexperienced officer, who, in attempting to remedy the condition, so aggravated it by burning the eyelids with silver nitrate that this officer was ordered transferred to the hospital in Manila, whence a board of medical officers recommended his transfer to the United States. Upon arrival at San Francisco he was placed under care of a medical officer who stated that he had never seen such a case and knew nothing of its treatment. A request from this officer for permission to have a civilian specialist examine his eyes was denied him and prejudiced him with some medical officers, until the Surgeon General directed that he be given sick leave. While on sick leave he was treated for four months by a skillful specialist, at the end of which time he requested to return to duty, and was sent back to San Francisco, where almost immediately he was ordered before a promotion board consisting of some of the same medical officers who had formed some hostility to him, and who required him to take every examination subject in writing, notwithstanding the serious condition of his eyes. Reporting for post duty the surgeon in charge took the prevision to send to the office of the Surgeon General a statement of this officer's condition, so that he would not be sent to localities where a relapse might occur.

In less than nine months, however, without examination as to his condition, he was sent to the Texas border, where exposure to strong sunlight and dust caused a quick relapse. A request for change of station was refused, and instead he was placed on sick leave and kept for over two months in a hospital without treatment. Finally, upon receiving two months' sick leave, he returned north, with the result that his eyes became so improved that he requested a return to duty. Eighteen months thereafter, again without previous examination as to his fitness, he was again ordered to the same post where the previous relapse had occurred. In the face of statements of the post surgeon and a skillful oculist that he was in no condition for such duty the military authorities revoked the order, but within less than three months, and notwithstanding that his eyes were not fit for tropical service, he was again ordered to the Tropics. At his request two distinguished oculists thoroughly examined him as to his fitness for duty and one advised against duty in the Tropics and the other advised to the effect that this officer would never be able to perform duty outside of the North Temperate Zone. Notwithstanding the finding by these specialists, a medical officer after a two-minute examination expressed the opinion that this officer could perform such duty, but that he would have to be careful. Accordingly, in compliance with orders, in December, 1915, this officer went to the Tropics, notwithstanding the opinion of the specialists that to do so would bring about a relapse, and upon reporting for duty found that instructions had been sent out from the Surgeon General's office what to do "in case Capt. Waring had a relapse of his old eye trouble." The chief surgeon of the post also took occasion to advise him that he knew that the Medical Corps was prejudiced against this officer.

He attempted to do duty to the best of his ability, but the tropical light more and more affected his eyes until, in the early part of January, he was forced to go on sick leave. In a few weeks he was sent to the Army hospital and there placed in a room with white walls and white furniture, where he was required to remain in his room except for one and a half hours morning and evening. Because he protested against this treatment he was charged with reflecting upon his superior officer and was subjected to the hazardous operation of spinal puncture. After having been kept at the hospital for about a month without treatment of any kind, he was ordered before a board of medical officers, who did not permit him to be present when testimony was given, but who pronounced him cured and sent him back to his post with his eyes in a worse condition than before. Various attempts were made here to force him to do duty, notwithstanding his incapacity, and finally after some weeks, with no previous intimation of court-martial, he was placed under arrest and notified that he would be tried. The course of administration clearly indicates that it was the purpose to force him out of the service by resignation or disciplinary measures.

This officer was charged and convicted (1) of the false statement to the effect that he was incapacitated for duty by reason of optic neuritis, and (2) of criticizing and casting discredit upon his superior officers, all in violation of the sixty-first article of war, and (3) of failure and neglect to obey orders, in violation of the sixty-second article, and was sentenced to dismissal. While the proceedings of the court-martial

were formally regular, the composition of the court was not such as to afford a fair trial. The matter had become one between Capt. Waring on the one hand and the Medical Department upon the other, and no officer interested in securing a conviction should have been permitted, as was done, to sit on the court over challenge. The Judge Advocate General of the Army held that upon the evidence he should have been convicted only of the neglect to obey orders, and recommended that the sentence be commuted to a loss of 25 files.

This in itself would indicate that this officer was incapacitated in the manner and to the extent claimed by him, that the attitude of the authorities toward him was wrong, and that he suffered a reduction in rank for having asserted a right which under regulations he was permitted to assert. Released from arrest, he remained on a status of leave until December, 1916, when he was ordered before a retiring board, the medical members of which were ordered from distant points to Chicago to serve on this special board "for the case of Capt. Waring only." For nearly six years his injury had been held officially to have been incurred in line of duty, but when he appeared before the retiring board the theory was advanced for the first time by two medical witnesses, not specialists in nervous diseases, that he was suffering from some obscure nervous disease, intimating that it was a congenital form of mental instability. One of these witnesses had officially reported the injury on three former occasions as having been incurred in line of duty. The board did not summon experts upon the diseases of the mind, and this disease, if it had been honestly supposed to exist, was such as to require the examination of most skillful specialists. A recent case in point, in which Congress took favorable action, was that of an officer in the Marine Corps who was retired for "mental instability," concerning the conduct of the retiring board in which case the Secretary of the Navy (Daniels) said:

"They did not summon experts upon diseases of the mind. * * * In a matter of such transcendent importance, where able men hold wholly different views, they should have called in, as they were requested to do, eminent alienists."

And in the instant case the Judge Advocate General said:

"That (that is, the obscure mental disease in issue) was a question for the determination of a neurologist and not an eye specialist."

But not even an eye specialist was called in, but rather a medical officer who was considered to be a specialist in the ear, nose, and throat diseases. The witnesses whose testimony resulted in the retirement of this officer disclaimed all special knowledge of nervous diseases and expressed only general opinions to the effect that the officer might be cured after treatment of some six months. When such opinions were expressed, request was made for a continuance in order to enable this officer to introduce expert testimony, but this was refused. The board, nevertheless, found him incapacitated for active service by reason of "neurosis affecting the function of the eyes to such an extent as to disable him for the performance of military duty," and further found that the cause of the incapacity was the injury from the light stroke hereinbefore referred to, but that the fundamental cause was "a defective nervous system"; and concluded that the injury was not incident to the service. However, this finding was not immediately acted upon, but instead the officer was sent to the Letterman Hospital, San Francisco, for treatment, which he seems never to have received. After he had been in the hospital for several weeks the commanding officer reported that Capt. Waring's condition was due to an "hystero-neurasthenic form of asthopia," with prognosis unfavorable for recovery. The condition was reported to be due "to an inherent unstable nervous organization which had existed prior to commission." Upon receipt of this ex parte report the President approved the findings of the retiring board and issued an order on May 5, 1917, wholly retiring this officer from the service. That action, however, was final, and can be remedied only by legislation.

Attention is invited to the fact that while the findings of the retiring board was that the disease was not of a permanent character, the report of the hospital authorities were exactly to the contrary; while the retiring board found that the exciting though not fundamental cause of the disability was an illness contracted while in the line of duty, the hospital authorities found that such disability was wholly attributable to an inherent unstable nervous organization. Obviously, final Executive action was taken less upon the conclusion of the retiring board, the only lawful agency, than upon the ex parte report of the commanding officer of the hospital. The general conclusion that the cause of the incapacity of this officer was to be found in an obscure nervous disease antedating his commission nine years before and remaining unrevealed throughout all his service, and that it was not incident to the service, is a mere matter of speculation and not of evidence, and in this case was unjust to the officer.

In view of the foregoing the committee recommends that the bill do pass.

The following report of the Acting Judge Advocate General to the Secretary of War is also interesting. By this report it appears that, in the opinion of that officer, "It is at least open to doubt whether such a conclusion (wholly retiring Capt. Waring) is altogether just to the officer." Because we believe with the Judge Advocate General that this conclusion was seriously open to doubt, we propose now to do justice to the officer, and it is difficult to understand why, in view of the acknowledged doubt, justice has not been done before.

OFFICE OF THE JUDGE ADVOCATE GENERAL.

August 7, 1918.

The SECRETARY OF WAR:

The case of J. B. H. Waring, formerly captain, Medical Corps, United States Army.

1. Dr. Waring was tried by general court-martial convened at Schofield Barracks, Hawaii, April 19, 1916, and sentenced to be dismissed the service. The sentence was confirmed, but commuted to the loss of files. In 1917 he was ordered before an Army retiring board, and as the result of its findings, which were approved by the President, was wholly retired from the service on May 5, 1917, under the provisions of sections 1252 and 1255, Revised Statutes. The Secretary has directed that the proceedings of the court-martial and those of the retiring board be reexamined by this office and that he be advised "whether any right of Dr. Waring has been denied him or whether any of the wise and usual precautions for the protection of the rights of officers have been abated in the procedure by which Dr. Waring's retirement has been brought about."

2. *The court-martial proceedings.*—The accused was convicted of unlawfully depriving the United States of his services by means of a false statement to the effect that he was incapacitated for duty by reason of optic neuritis, an eye disease, in violation of the sixty-first article of war, and of criticizing and casting discredit upon his superior officers, in violation of the same article of war, and of failure and neglect to obey orders, in violation of the sixty-second article of war, and, as stated, he was sentenced to be dismissed the service. The accused pleaded not guilty throughout, relying upon the alleged presence of the disease in question as legal defense to such actions as he committed. Optic neuritis is an inflammation of the optic nerve. It is always present when there is retinitis, an inflammation of the retina, and is said by some to be the same as neuro-retinitis. The accused claimed that this trouble with his eyes was the result of heat prostration, which occurred at Parang, P. I., while he was on duty, June 2, 1911. On August 1, 1916, upon a review of the record of the court-martial proceedings, this office concluded that the evidence justified only the conviction of the accused of the offenses of having disobeyed lawful orders of his superior officers, in violation of the sixty-second article of war, and recommended that while the sentence be approved, it be commuted as stated. This conclusion was based partly upon the fact that while the evidence showed that although at the time of the commission by him of the alleged offenses the accused was not suffering from optic neuritis as claimed by him, there was evidence to show that he had been advised by eye specialists to that effect, and that in making statements to his superior officers, to the effect that he was incapacitated for duty by reason of that disease, he was acting in good faith and was not uttering deliberate falsehoods.

There is nothing to indicate that, in the court-martial proceedings, any right was denied Dr. Waring or any precaution omitted for his protection.

3. *The proceedings of the retiring board and the action of the President thereon.*—The retiring board convened in Chicago, Ill., January 27, 1917, by direction of the President. It was composed of five officers, two of whom were officers of the Medical Corps. Dr. Waring was present in person and was represented by counsel. He stated he had no objection to offer to any of the members of the board. In reply to a question by the board as to whether he desired to be retired, he stated that in his belief he had a physical infirmity which disqualified him from service, and if the board should reach the conclusion that such was the fact he would be glad to file with the board, or through the proper channels, an application for retirement. He further stated that if his eyes were permanently injured so that he could not properly perform his duties it would unquestionably be to the best interests of the service that he be retired from the active list and he would not oppose retirement. The hearing before the board lasted from January 10 to January 16, 1917. Two officers of the Medical Corps, Maj. Peter C. Field and Maj. Theodore C. Lyster, testified. Maj. Field testified that, in his opinion, Dr. Waring was suffering from asthenopia, or eye strain, which was caused by instability of his nervous system. The witness was unable to

state whether the symptoms of asthenopia had existed prior to Dr. Waring's commission, or whether there had been some additional stress or strain during his service sufficient to produce the symptoms. This witness disclaimed expert qualifications and special knowledge of nervous diseases. Maj. Lyster testified that, in his opinion, Dr. Waring was suffering from nervous asthenopia, due to congenital instability of the nervous system. He stated he was not a neurologist and was therefore not competent to prescribe treatment for this condition. Both of these witnesses testified that, in their opinion, the trouble with which Dr. Waring was suffering was not of a permanent nature and did not incapacitate him for active service, provided he was willing to perform his duty and possessed sufficient will power to maintain self-control. Dr. Waring expressed a belief that the diagnosis of these physicians would not be confirmed by neurologists, and, upon the ground that he was surprised by their testimony, moved the board that it take an adjournment until January 25 to enable him to consult with specialists and adduce their testimony. This motion was denied. Dr. Waring then went on the stand and testified at length as to his medical history and expressed the opinion that any ocular symptoms and any nervous symptoms he presented were directly attributable to a sunstroke which he received at Ludlow Barracks, P. I., on June 2, 1911, while performing his official duties as an officer of the Army.

4. The board's finding was as follows:

"* * * That Capt. John B. H. Waring is incapacitated for active service by reason of a neurosis affecting the function of the eyes to such an extent as to disable him for the performance of military duty.

"The board further finds that the existing cause of the incapacity was an illness at Parang, P. I., June 2, 1911; that the underlying or fundamental cause is a defective nervous system; that said incapacity is not incident to the service; and that it is not permanent."

Thereafter the Surgeon General recommended that Dr. Waring be ordered to the Letterman General Hospital in San Francisco for observation and treatment for a period of six weeks, upon the ground that the finding of the board was that the officer was only temporarily incapacitated, and upon the further ground that the underlying cause of his trouble was one which required observation and treatment by an expert neurologist. Dr. Waring was thereupon ordered to the hospital named and was there under observation and treatment for the time prescribed. At the conclusion of his stay at the hospital the commanding officer submitted an opinion of his physical and mental condition based upon the observation of the hospital officials and of Dr. H. L. Wagner, of San Francisco, a specialist in diseases of the eye, ear, nose, and throat, who had charge of the eye clinic of the hospital. The report stated that Dr. Waring's eye condition was due to an "hystero-neurasthenic form of asthopia" and there was no evidence to show that he was suffering from a neuroretinitis or other organic disease of the eye or brain. The prognosis of the case was reported to be unfavorable to recovery from the basic disease. It was stated that the eye symptoms might improve at some future time and later give place to other nervous symptoms of a more or less disabling character. The condition of Dr. Waring was reported to be due to an inherent unstable nervous organization which had existed prior to commission, and it was found that this disability was permanent. Accordingly his retirement was recommended.

The President thereafter approved the findings of the retiring board and, on May 5, 1917, an order was issued wholly retiring Dr. Waring from the service as above stated.

5. (a) The action of the President in approving the findings of the retiring board and wholly retiring Dr. Waring from the service was final and can not be reviewed nor can the case be reopened. This office has so advised in this case in a letter addressed to Hon. Claude A. Swanson, dated June 1, 1917, and in a memorandum to the Secretary dated August 15, 1917.

"The finding of a retiring board, approved by the President, is conclusive as to the facts. The board finds the facts, and the President approves and disapproves the finding. There is here a judicial power vested in the two and not in the President acting singly, and when the power has been once fully exercised it is exhausted as to the case." (Digest, J. A. G., p. 987, I. B. 3d.)

This rule has been followed in numerous subsequent cases. It has also been held by this office that the separation of an officer from the service by an approved sentence of court-martial, or by being "wholly" retired, or by acceptance of a resignation, has the effect of making such officer a civilian precisely as though he had never been in the Army at all. He can be admitted to it again only by being newly commissioned as an officer. It has been further held that a revocation of the order by which he was dismissed, or "wholly" retired, or in which his resignation was accepted must,

after notice, be quite futile and ineffectual, and that an order purporting to revoke a previous order by which an officer has been legally detached from the military service is a simple nullity. (Dig. Op., J. A. G., p. 808, III F I; see also *United States v. Burchard*, 125 U. S., 176.)

Although for the reasons given the case of Dr. Waring can not be reopened or reviewed, attention is invited to the fact that while the finding of the retiring board was that his disease was not of a permanent character, the report of the hospital authorities was exactly to the contrary, namely, that it was permanent; and the further fact that while the retiring board found that the exciting but not fundamental cause of the existing disability of Dr. Waring was an illness contracted while in the line of duty, the hospital authorities found that such disability was wholly attributable to an inherent unstable nervous organization. It is quite possible that the President, although called upon by law to act upon the findings of the retiring board alone, was influenced to some extent by the report of the hospital authorities, whose examination of Dr. Waring's case was necessarily *ex parte*. His action, of course, should have been based wholly upon the findings of the retiring board, whose examination of the case was, as required by law, *inter partes*. It is also to be observed that the approval of the findings of the retiring board necessarily involved the conclusion that if an officer whose nervous system is somewhat unstable when he enters the service although his physical examination at that time may not disclose that fact thereafter, and while in the service contracts a disease which in connection with his nervous trouble disables him from service, he should be wholly retired and not placed on the retired list. It is at least open to doubt whether such a conclusion is altogether just to the officer.

(b) It can not be said as a matter of law that the action of the retiring board in refusing to permit Dr. Waring to adduce evidence in rebuttal of the testimony of the two physicians who testified that the disease with which he was suffering was not incident to the service deprived him of any strictly legal right. It is always discretionary with a court or any board exercising judicial functions to grant a continuance on the motion of either party, in order that he may adduce additional service, and in order that it may be said that the legal rights of a party making such a motion have been injuriously affected, it must be clearly shown that this discretion has been grossly abused. In this case it can not be said that such was the fact. The hearings of the board lasted six days and it was not until the last day of its sessions that the motion was made in behalf of Dr. Waring. On the day the board convened Maj. Field submitted a written report of the result of an examination he had made of Capt. Waring, and the court directed that it be submitted to Dr. Waring's counsel, and the examination of Maj. Field was suspended until a later day. Immediately thereafter and on the same day Maj. Lyster commenced his testimony and continued it on the following day, and at its conclusion, and on the same day, Maj. Field testified. Dr. Waring and his counsel were therefore apprised four or five days before the motion in question was made of the opinion of these witnesses.

But while it can not be said, for the reasons given, that the retiring board abused its discretion in overruling this motion in behalf of Dr. Waring for a continuance to enable him to adduce rebutting testimony, it is proper to observe that in the opinion of this office it would have been more in consonance with justice if the motion had been granted. There is nothing in the record of the proceedings of the retiring board to show that there was any need of haste in the board's reaching a finding. There is nothing in the medical history of Dr. Waring which was submitted to the board to show that in any of the many previous examinations that had been made of him any physician had suggested the existence in him of any previous or other trouble which antedated his entry into the service. Presumably, if such a trouble had existed, it would have been disclosed by the physical examination which preceded his commission. Among the papers which have been submitted to this office is a report dated March 31, 1912, of the commanding officer of the Letterman General Hospital, where Dr. Waring was examined for promotion, in which it was stated that at the time of such examination his nervous system was normal, and he was recommended for promotion both on the ground of physical and mental fitness. It is to be noted also that since he suffered that heat stroke in the Philippines in June, 1911, the examinations that have been made of him seem to have been made by eye specialists and not by neurologists. If, as the retiring board and the authorities of the hospital found, the condition of his eyes was attributable to an impairment of his nervous system, the sole question in his case was whether his impaired nervous condition antedated his commission or was the result of the heat stroke which he suffered while in line of duty, and that was a question for the determination of the neurologist and not the eye specialist. If the heat stroke was the cause of his impaired nervous condition, the many vagaries which he exhibited subsequently might well be attributable to disease contracted while in line of duty.

6. In accordance with the directions of the Secretary, the memorandum of the Surgeon General dated July 31, 1918, regarding Dr. Waring, has been considered by this office. It contains a very complete medical history of Dr. Waring and deals as well with his efficiency as a medical officer; and this office can not, of course, take issue with its conclusions so far as they are based on the professional opinion of the officers of the Medical Corps. Considering, as it must, the case from a purely legal standpoint, the conclusions of this office are based solely upon the facts disclosed by the record which are pertinent in the determination of the question whether the legal rights of this former officer were in all respects safeguarded during the controversies in which he was engaged while he was connected with the service.

7. For the reasons set forth above, this office replies as follows to the questions submitted by the Secretary: (1) No legal right of Dr. Waring has been denied him; but (2) a somewhat too unyielding exercise of its discretionary power by the retiring board resulted in Dr. Waring being deprived of the right to adduce evidence in his own behalf which might possibly have resulted in a different finding by the board, or which might have induced the President to withhold his approval of the board's finding.

S. T. ANSELL,
Acting Judge Advocate General.

